

ROSA A. MARTINEZ
Claimant

RUSSELL STOVER CANDIES
Respondent

SENTRY INSURANCE,
Insurance Carrier

¹ Order (July 25, 2003).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date and the claimant's letter and respondent's brief, the Board makes the following findings of fact and conclusions of law:

At a preliminary hearing held on February 19, 2003 before Administrative Law Judge Bryce D. Benedict, claimant presented the medical evaluations from physicians Dr. Robert Eyster and Dr. Pedro A. Murati. As each physician offered a different opinion on whether the claimant's pain arose out of and in the course of her employment, Judge Benedict ordered an independent medical examination to be conducted by Dr. Sergio Delgado.

A second preliminary hearing was held on July 23, 2003. Judge Benedict reviewed the medical evaluation of Dr. Edward J. Prostic presented by claimant as well as the medical report of Dr. Delgado. Dr. Prostic stated in a letter to claimant's attorney dated July 9, 2003 that "[t]he work described by Ms. Martinez was sufficient to aggravate pre-existing cervical spinal stenosis and to cause or aggravate her shoulders."² Dr. Delgado's impression of claimant's pain was that "her symptoms could have been temporarily aggravated by work activities. . . .[but]. . . [t]he fact that she continues to complain of persistent and progressive complaints leads me to the opinion that her musculoskeletal symptoms are not work related."³

Judge Benedict found more compelling the causation opinions of Drs. Delgado and Eyster and denied claimant's request for medical treatment. Claimant contends the ALJ erred and that the medical opinions of Drs. Murati and Prostic are the most credible.

Respondent argues the Board does not have jurisdiction to address this issue on review from a preliminary order. The Board does not agree. On appeals from preliminary hearing orders K.S.A. 44-534a gives the Board jurisdiction to consider the following issues: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice is given or claim timely made; (4) whether certain defenses apply. These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. In this instance, the preliminary hearing order denied medical treatment because the court found the causation opinions of Drs. Delgado and Eyster more compelling. As such, the issue is whether the injury for which claimant is seeking medical treatment arose out of and in the course of the employee's employment. The Board has jurisdiction to review this issue on an appeal from a preliminary hearing order.

² P.H. Trans. (July 23, 2003) Cl. Ex. 3.

³ Letter from Sergio Delgado, M.D., to Bryce D. Benedict (April 11, 2003).

As for the merits of claimant's appeal, the Board agrees that the record fails to prove that claimant's present need for medical treatment for her back, neck, shoulder and arm pain is due to personal injury by accident that arose out of and in the course of her employment with respondent. Consequently, the Board must deny claimant's request for benefits.

WHEREFORE, Administrative Law Judge Bryce D. Benedict's preliminary hearing Order dated July 10, 2003 is affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

- c. C. Albert Herdoiza, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Sentry Insurance Company
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director